Unauthorized Practice

State UPL Regulators Try to Numb ‘Dental Examiners’ Pain (Corrected)

Regulators who combat unauthorized practice of law are still feeling aftershocks from U.S. Supreme Court’s decision in Dental Examiners, which exposes “active market participants” who regulate their own markets to liability for antitrust violations. N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 2015 BL 48206, 31 Law. Man. Prof. Conduct 108 (2015).

Dawn Miller Evans, Disciplinary Counsel and Director of Regulatory Services at the Oregon State Bar, presented a panel discussion of how UPL regulators seek to avoid antitrust liability while still protecting the public from unlicensed lawyers. Titled UPL Enforcement, New Delivery Models, The North Carolina Dental Board Decision and the FTC: What, If Anything, Must We Do Differently?, the panel was part of the ABA Center for Professional Responsibility’s third annual UPL School, held in Chicago Oct. 26-27.

To claim immunity, a regulatory agency controlled by active market participants must satisfy two requirements: it must be implementing a clearly articulated state policy, and it must be closely supervised by a state actor who is not himself an active market participant. See 32 Law. Man. Prof. Conduct 360; 31 Law. Man. Prof. Conduct 462.

The panel described the decision’s impact in Texas and Ohio, two jurisdictions that rely solely on volunteers for unauthorized practice of law (UPL) enforcement. Leland C. De La Garza, who chairs the Texas Supreme Court Unauthorized Practice of Law Committee, explained how Texas has responded to Dental Examiners, and Heather M. Zirke, Bar Counsel for the Cleveland Metropolitan Bar Association, discussed what happened when the volunteers there were sued in the wake of the decision.


Texas De La Garza explained that there are six lawyers and three nonlawyers on the Texas Supreme Court Unauthorized Practice of Law Committee. All are volunteers appointed by the state’s supreme court. The committee is authorized by statute, he said, “and we are charged with eliminating UPL.”

Texas is divided into five regions for UPL enforcement, and the incidence of UPL varies widely among the regions: “West Texas, for example, has more jackrabbits than UPL-ers.” Each of the regions has its own chair. There are approximately 100 subcommittees across the state, and “that is where the boots hit the ground,” he said.

De La Garza explained that in Texas, unlike in other jurisdictions, “we don’t have the power to issue cease-and-desist letters.” “But,” he continued, “we can resolve the matter with a C&D agreement.”

He noted some other features of Texas’s system that differentiate it from that of the dental board. First, Texas is complaint-driven. “We don’t do investigations on our own, which is what the dental board did.”

Second, he said, “Texas rules prohibit the board from giving advice or opinions, and we tell our investigators to never do this.” Third, “Texas relies on courts for enforcement authority.”

“We have no power to punish,” he continued. “If we think it’s UPL we take it to a court and ask a court to decide.” His committee can seek only injunctive relief, and “we do have to make sure our subcommittee members don’t go ‘John Wayne’ on us.”

“Our biggest challenge is to get and keep the volunteers, and to keep an all-volunteer entity running in a very large state.”

“So what happens when the U.S. Supreme Court lays the Dental Board decision on a voluntary organization like ours?” he asked. “The first question [for any volunteer] to ask is, ‘What happens if I get sued?’” De La Garza said that Justice Kennedy in his opinion acknowledged that the ruling may discourage volunteer service, but Kennedy’s response is to point out that states could agree to defend and indemnify board members.

“Not a lot of comfort,” De La Garza commented. Only four hands went up when the attendees were asked if their jurisdictions provide insurance to UPL board members; one person reported that limited indemnity is available through the bar association.

“We went to an antitrust lawyer and had our procedure reviewed,” he said. “One immediate change we made is when we write a letter closing the file we don’t say we have found no UPL.” Similarly “when we start a proceeding we don’t say we have found UPL,” he said.

When a matter is closed, “we just say that after conducting an investigation of a complaint made against you based on [whatever the information is], the committee has decided to close its investigation.” The letter
warns that closing the file is not to be construed as approval, and the committee reserves the right to reopen the investigation. “We are vigilant to make sure our volunteers don’t make up their own language,” he added.

He gets calls all the time asking, “Is what I’m doing OK?” His answer is always that the Supreme Court prohibits him from giving an opinion. He will, however, help by directing the caller towards the authorities the caller will need to research.

The committee has modified its handbook and is educating its members, he said. De La Garza said that later in the week he would film a training video that will be available online.

“I want to keep my volunteers and protect them.”

**Ohio** Zirke said that the Cleveland bar’s “tales of woe” began when an Ohio resident complained about a Louisiana company called Express Lien, doing business as zlien, that was offering cloud-based “one-stop shopping for mechanic’s liens.” The contractor would enter the information online, and zlien would sign as agent pursuant to a power of attorney from the contractor. The Ohio contractor said zlien had missed the statute of limitations on his lien and was refusing to refund his money.

The Cleveland bar filed a complaint against Express Lien alleging UPL. The following month Express Lien, citing **Dental Exam’rs** v. FTC, 135 S. Ct. 1101, 2015 BL 48206, 31 Law. Man. Prof. Conduct 453, and Express Lien Inc. v. **Texas Medical Board**, No. 1-15-CV-3443 RP, 2015 BL 408940 (W.D. Tex. Dec. 14, 2015), No. 16-50017 (5th Cir. 2016) (appeal withdrawn Oct. 27, 2016), explained that the FTC has two concerns: antitrust and consumer protection. He emphasized that his remarks were his own and he was not speaking for the FTC. For the FTC position, he referred attendees to the FTC’s work, for example by focusing on out-of-state lawyers or lawyers who are practicing even though they are suspended or disbarred; or “shutting down altogether.”

[The Washington State Bar Association’s ethics committee briefly stopped issuing ethics opinions in 2015 for fear of potential antitrust liability. See 31 Law. Man. Prof. Conduct 730. It has since resumed issuing opinions with respect to issues that do not fall within the area of antitrust. See 32 Law. Man. Prof. Conduct 726.]

**Antitrust Enforcement** O’Toole gave his personal perspective on antitrust issues in professional licensing. He explained that the FTC has two concerns: antitrust and consumer protection. He works in consumer protection, but he used to work in antitrust. He emphasized that his remarks were his own and he was not speaking for the FTC. For the FTC position, he referred attendees to the FTC’s work, for example by focusing on out-of-state lawyers or lawyers who are practicing even though they are suspended or disbarred; or “shutting down altogether.”

**Oregon** Evans discussed Oregon’s response to Dental Exam’rs. “We’ve stopped writing cease-and-desist letters,” she said. An audience member noted that the Oregon bar’s informational letter does not make any sort of findings; all it says is “you may wish to seek legal advice about whether this constitutes the unlawful practice of law.”

Evans said there are also changes in some provisions of the Bar Act: “No more than one fourth of the members of the committee can be in private practice.” And while the Bar Act formerly gave examples of what would be considered the practice of law, “we’ve eliminated that language now, so it reads like it does in most other states and doesn’t define the practice of law.”

“Note that it’s not called the unauthorized practice of law, but the unlawful practice of law,” she added.

Evans reported on some additional responses she has found in other jurisdictions. They include modifying committee composition to decrease participation by private practitioners; narrowing the scope of the committee’s work, for example by focusing on out-of-state lawyers or lawyers who are practicing even though they are suspended or disbarred; or “shutting down altogether.”

Oregon’s response to Dental Exam’rs was very similar. “We did, however, have to hire local counsel in Louisiana and an antitrust lawyer.”

**LegalZoom** settled, see 31 Law. Man. Prof. Conduct 676, but Express Lien’s action kept going. Ultimately “zlien agreed the mechanic’s liens would be sent to the customer to sign and file, and the case settled.” See 32 Law. Man. Prof. Conduct 453.

Zirke said that “as a bar association we have become very cautious in our investigations.” “We’ve never done cease and desist agreements,” she said, “but we’ve done letter agreements.” She thinks that for the Cleveland bar association, the days of private agreements may be over.

Her parting advice: “Make sure you read the policy that protects your volunteers; look for any antitrust exceptions. You might get sued, but you’ll survive it too.”
O’Toole then took up some of the points De La Garza and Zirke had made in describing how their states are responding to Dental Examiners.

From an antitrust standpoint, he said, any consent agreement, publicized or not, “expands the horizontal conspiracy. But if the conduct you’re going after is bad, there’s probably no liability anyway.”

“Not sure that really solves [the problem],” he added.

As far as active market participants, he believes the method by which appointment to a UPL committee is made is irrelevant, and that temporarily suspending a member’s participation in a particular market is also irrelevant.

As for market participants exercising “control,” he said, this may mean looking at the practical effect of their participation rather than the raw numbers — for example, do the lay members always defer to the professionals?

**Rule of Reason**

O’Toole explained that courts approach antitrust cases in one of two ways. Either the court finds a per se violation — for example, horizontal competitors getting together to fix prices — or it uses a rule of reason and “looks at everything and measures the benefits against the anticompetitive effects.” The context-dependent language in Kennedy’s opinion, he said, is typical of cases applying the rule of reason.

An audience member said that in her jurisdiction, regulators are trying to focus on ameliorating consumer harm. She cited as an example the harm caused by mortgage “helpers” who get the homeowner to sign the house over to them with a quitclaim deed, and then charge rent while the foreclosure proceeds. If you apply a rule of reason shouldn’t you also consider that kind of harm, not just the harm to competition? she asked.

O’Toole, agreeing, said the rule of reason does let you consider that kind of harm.

**Advertising Rules**

Miller said that nationwide, “bars have been pulling back” from enforcement of advertising rules.

Selina Thomas, client protection counsel at the ABA Center for Professional Responsibility, noted that the Association of Professional Responsibility Lawyers has recommended an extensive revision of the rules. See 33 Law. Man. Prof. Conduct 66. She said APRL’s proposal is being reviewed by the Standing Committee on Ethics and Professional Responsibility and the Center, and how it will fare with the ABA and the jurisdictions remains to be seen.

**RBI Act**

Miller concluded with an analysis of the Restoring Board Immunity Act of 2017 (H.R. 3446, introduced July 27 by Carl Issa (R-Cal) and S. 1649, introduced the same day by Mike Lee (R-Utah). The bill’s articulated purposes are “to help States combat abuse of occupational licensing laws by economic incum-